

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

ROBERT ADELL BROWN, Cause No. CV 07-026-BLG-RFC-CSO

Plaintiff,

vs.

RANDY GORMAN,

**FINDINGS AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE
TO GRANT IN PART AND DENY IN PART
DEFENDANT'S MOTION TO DISMISS**

Defendant.

This matter comes before the Court on Defendant's Motion to Dismiss the Complaint Pursuant to Fed.R.Civ.P. 12(b)(1) and (6). (Court's Doc. No. 7). Defendant argues that the Court lacks subject matter jurisdiction over the Complaint and that Plaintiff has failed to state a claim upon which relief may be granted.

I. PLAINTIFF'S ALLEGATIONS

Plaintiff is an African-American man who currently lives in North Dakota.

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According to his Complaint, Plaintiff purchased a small condominium in July 2003 in Wibaux, Montana. Plaintiff lived in this condominium from September 3, 2003, to December 1, 2006. Plaintiff alleges that during that period of time there were "non stop daily and cowardly acts of racism." (Court's Doc. No. 1, p. 4, ¶ IV.A.1).

Defendant Randy Gorman was a neighbor of Plaintiff and a former Montana Highway Patrolman. At the time of the filing of the Complaint, Defendant Gorman was employed as a corrections officer at the Glendive County Jail. According to Plaintiff, Defendant Gorman "orchestrated this terrible plan and urged others to join his nefarious cabal for the purpose of running this petitioner out of the town of Wibaux, Montana." (Court's Doc. No. 1, p. 4, IV.A.2).

Specifically, Plaintiff alleges that on April 14, 2004, someone stole the trailer hitch tow ball from his pickup truck parked in his assigned parking space at Plaintiff's residence. Plaintiff contends he filed a report with the Sheriff in Wibaux but that there was no response and nothing was done to solve the problem. (Court's Doc. No. 1, p. 5).

Plaintiff next alleges that on February 14, 2005, someone stole the outside parking lot light bulb that illuminated the resident parking lot where Plaintiff parked. Again the Sheriff of Wibaux was apprised, a report was taken, and there was no response to Plaintiff's complaint. (Court's Doc. No. 1, p. 5).

On August 1, 2005, Plaintiff contends that a methamphetamine manufacturer

moved into an upstairs unit with two young children and a pet rattlesnake. Plaintiff states that when the snake escaped, the Sheriff of Wibaux was summoned to find and ultimately destroy the rattlesnake. (Court's Doc. No. 1, p. 5).

Plaintiff next alleges that there was illegal activity in the building where he lived. He contends that other tenants in the building manufactured and distributed illicit drugs and transported their product on Highway I-94 between Montana and North Dakota unimpeded. Plaintiff complains that Defendant Gorman did not run these individuals out of town. (Court's Doc. No. 1, p. 5).

Lastly, Plaintiff alleges that on or about April 22, 2006, while he was traveling on Interstate 94 and entering Wibaux County, he was issued a speeding citation by then Montana Highway Patrolman Randy Gorman. Plaintiff contends that he was racially profiled by Defendant Gorman. He alleges that other white motorists routinely passed his vehicle in plain view of the Montana Highway Patrolmen and were not cited. (Court's Doc. No. 1, pp. 6-7).

Plaintiff is seeking a monetary judgment in the amount of \$100,000.00 and compensatory damages of \$1,000,000.00. He also seeks the right of free and unimpeded access to drive and use Highway I-94.

II. ANALYSIS

A. Standard

Defendant has filed his Motion to Dismiss pursuant to Rules 12(b)(1) and

12(b)(6) of the Federal Rules of Civil Procedure, requesting that the Court dismiss this matter for lack of subject matter jurisdiction (Rule 12(b)(1)) and for failure to state a claim upon which relief can be granted. (Rule 12(b)(6)). In ruling on Defendant's Motion to Dismiss, review is limited to the contents of Plaintiff's Complaint. [Clegg v. Cult Awareness Network, 18 F.3d 752, 754 \(9th Cir. 1994\)](#). Plaintiff's factual allegations must be taken as true and construed in the light most favorable to Plaintiff. [Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 \(9th Cir. 2005\)](#). Dismissal is not appropriate "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim entitling plaintiff to relief." [Id., at 946](#). A complaint does not need to include detailed facts to survive a [Rule 12\(b\)\(6\)](#) motion to dismiss. [Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1965. \(2007\)](#). However, in providing grounds for relief, a plaintiff must do more than recite the formulaic elements of a cause of action. [Id. at 1966](#). The plaintiff must include enough facts to raise a reasonable expectation that discovery will reveal evidence. In other words, the plaintiff must allege enough facts to state a claim for relief that is plausible on its face. [Id. at 1974](#). "[C]onclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim." [McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 \(9th Cir. 1988\)](#).

When a plaintiff appears pro se, the court has an obligation to construe the plaintiff's complaint liberally. See [Bernhardt v. Los Angeles County, 339 F.3d 920, 925](#)

(9th Cir. 2003); [Jackson v. Carey, 353 F.3d 750, 757 \(9th Cir. 2003\)](#) (same). "A pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." [Erickson v. Pardus, 127 S.Ct. 2197, 2200 \(2007\)](#) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285 (1976)); Cf. [Fed. Rule Civ. Proc. 8\(f\)](#) ("All pleadings shall be so construed as to do substantial justice"). Pro se plaintiffs in a civil rights action must be afforded the benefit of any doubt. See [Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623 \(9th Cir. 1988\)](#). "A pro se litigant must be given leave to amend his or her complaint unless it is 'absolutely clear that the deficiencies of the complaint could not be cured by amendment.' " *Id.* (quoting [Noll v. Carlson, 809 F.2d 1446, 1448 \(9th Cir. 1987\)](#)).

B. Timeliness of Defendant's Motion

Plaintiff argues that Defendant's motion to dismiss is untimely because Defendant's brief was filed six days after his motion. However, Defendant is correct that pursuant to Local Rule 7(c) a brief in support of a motion may be filed within five days of filing the motion. Rule 6 of the Federal Rules of Civil Procedure provides the methods for computing time specified in local rules. Under Rule 6(a)(1), the day of the event that begins the period is excluded. Thus, the day of the filing of Defendant's Motion, November 5, 2007, is excluded. Pursuant to Rule 6(a)(3), if the last day falls on a Saturday, Sunday, or legal holiday the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. Five days after the filing of

Defendant's motion was Saturday, November 10, 2007. Monday, November 12, 2007, was a legal holiday, therefore, Defendant's brief was timely filed on Tuesday, November 13, 2007.

As Defendant's motion was correctly filed with an electronic signature pursuant to Local Rule 11.1, the Court finds that Defendant timely and properly filed a response to Plaintiff's Complaint. Plaintiff's request to have Defendant's Motion stricken is denied.¹

C. Jurisdiction

Defendant first argues pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure that the Court lacks subject matter jurisdiction over Plaintiff's Complaint. Defendant argues that Plaintiff has failed to cite any jurisdictional statute in the United States Code and has failed to allege the violation of any specific right under the United States Constitution or federal statutes. As such, Defendant contends that Plaintiff has failed to establish that the Court has subject matter jurisdiction. (Court's Doc. No. 9, pp. 4-5).

As set forth above, since Plaintiff is a pro se litigant, his Complaint must be liberally construed. Plaintiff's Complaint generally alleges a violation of civil rights and makes specific allegations of racial discrimination and racial profiling. Moreover, in his

¹Defendant's Motion to Strike Plaintiff's Surreply (which deals primarily with the timeliness argument) will be granted pursuant to Local Rule 7.1(g) which provides that no further briefing (after the brief, response and a reply) will be allowed without leave of court.

response to Defendant's Motion to Dismiss, Plaintiff clarifies that his allegations are made under 42 U.S.C. § 1983 for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. (Court's Doc. No. 12, p. 4, ¶ 4b).

Even if Plaintiff's Complaint were unclear as to Plaintiff's cause of action, this is an error which could easily be cured by amendment. To the extent necessary, the Court will construe Plaintiff's Opposition to Defendant's Motion to Dismiss as an amendment to his Complaint clarifying that his claims are made pursuant to [42 U.S.C. § 1983](#) for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Accordingly, this Court has jurisdiction to hear Plaintiff's claims pursuant to [28 U.S.C. § 1331](#).²

D. Claims regarding Plaintiff's Residence

Plaintiff makes a number of allegations regarding criminal acts at his residence. As set forth above, he contends that his trailer hitch tow ball was taken, an outside light bulb was taken, a rattlesnake escaped, and drug dealers who lived in his condominium complex manufactured and distributed illicit drugs on Highway I-94, unimpeded.

It is unclear whether Plaintiff is alleging that Defendant Gorman was involved in these criminal acts or simply that Defendant Gorman failed to stop these criminal acts. Either way, Plaintiff's allegations in this regard fail to state a claim. First, Plaintiff has

²The Court also notes that given that the parties are citizens of different states (Plaintiff is a resident of North Dakota and Defendant is a resident of Montana), and Plaintiff is seeking damages in excess of \$75,000.00, the Court would also have diversity jurisdiction over this matter pursuant to [28 U.S.C. § 1332](#).

failed to specifically plead that Defendant Gorman was responsible for the alleged criminal acts. Even if he was, there is no allegation that Defendant Gorman was acting in his official capacity as a Montana Highway Patrolman or a Glendive County employee with regard to the events at Plaintiff's residence. As such, Plaintiff cannot state a claim under [42 U.S.C. § 1983](#). See [West v. Atkins, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 \(1988\)](#) ("To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.").

Plaintiff's allegations that Defendant Gorman should have done more to stop the alleged criminal acts also fail to state a claim. Plaintiff alleges that he was complaining to the Sheriff of Wibaux County, not to Defendant Gorman who worked for the Highway Patrol. There is no allegation that Plaintiff lodged a single complaint with Defendant Gorman regarding the situation at the condominium complex. Moreover, in general there is no constitutional duty of law enforcement officials to protect members of the public at large from crime. See [Martinez v. California, 444 U.S. 277, 284-85 \(1980\)](#). Therefore, Defendant Gorman did not owe Plaintiff a duty to run the alleged drug dealers out of town or respond to the complaints of criminal activity.

Defendant's motion to dismiss should be granted as to Plaintiff's first four allegations as listed on page five of his Complaint.

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E. Racial Discrimination Claim / Heck v. Humphrey

Plaintiff's final claim is that he was racially profiled for speeding based upon his race. Defendant argues that if Plaintiff is alleging that he was unconstitutionally convicted or sentenced, his claim is barred by the doctrine set forth in [Heck v. Humphrey, 512 U.S. 477, 486-87 \(1994\)](#). The Court agrees that if Plaintiff is attempting to challenge his conviction for speeding, that claim would be barred by Heck. However, the Court does not read Plaintiff's Complaint to challenge his speeding conviction. Rather, Plaintiff's allegation is an equal protection claim.

The Equal Protection Clause of the Fourteenth Amendment of United States Constitution protects individuals against certain types of discrimination. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." [Washington v. Davis, 426 U.S. 229, 239 \(1976\)](#). A claim under [42 U.S.C. § 1983](#) for violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution requires a showing of purposeful discrimination. See e.g., [Crawford-El v. Britton, 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 \(1998\)](#).

To state a claim under [42 U.S.C. § 1983](#) for a violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class.

[Barren v. Harrington, 152 F.3d 1193, 1194 \(9th Cir. 1998\)](#) (citing Washington v. Davis, 426 U.S. at 239-40).

Plaintiff alleges that he was racially profiled because as an African American he was stopped for speeding by Defendant Gorman while white motorists traveling at speeds in excess of the speed limit were not stopped. This is sufficient to state a claim for denial of equal protection on the basis of race. Plaintiff is not challenging his conviction, and his racial discrimination claim, if successful, would not necessarily imply the invalidity of his underlying conviction. Accordingly, Plaintiff's claims are not barred by [Heck v. Humphrey, 512 U.S. 477.](#)

Based upon the foregoing, the Court issues the following:

ORDER

Defendant's Motion to Strike Plaintiff's Surreply (Court's Doc. No. 15) is **GRANTED**. The Clerk of Court shall have the docket indicate that Plaintiff's Surreply (Court's Doc. No. 14) is **STRICKEN**.

Further, the Court issues the following:

RECOMMENDATION

Defendant's Motion to Dismiss Complaint (Court's Doc. No. 7) should be **GRANTED** as to Plaintiff's first four allegations as listed on page five of Plaintiff's Complaint. Defendant's Motion to Dismiss should be **DENIED** with regard to Plaintiff's allegation that Defendant Gorman racially discriminated against him in the issuance of the speeding citation.

**NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATION AND
CONSEQUENCES OF FAILURE TO OBJECT**

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Findings and Recommendations within ten (10) business days of the date entered as indicated on the Notice of Electronic Filing. A district judge will make a de novo determination of those portions of the Findings and Recommendations to which objection is made. The district judge may accept, reject, or modify, in whole or in part, the Findings and Recommendations. Failure to timely file written objections may bar a de novo determination by the district judge.

DATED this 29th day of April, 2008.

/s/ Carolyn S. Ostby
Carolyn S. Ostby
United States Magistrate Judge